

ADAM A. REEVES (NYBN 2363877)
Attorney for the United States,
Acting Under Authority Conferred By 28 U.S.C. § 515

HALLIE HOFFMAN (CABN 210020)
Chief, Criminal Division

JEFF SCHENK (CABN 234355)
JOHN C. BOSTIC (CABN 264367)
ROBERT S. LEACH (CABN 196191)
Assistant United States Attorneys

150 Almaden Boulevard, Suite 900
San Jose, California 95113
Telephone: (408) 535-5589
FAX: (408) 535-5066
john.bostic@usdoj.gov

Attorneys for United States of America

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)	CASE NO. 18-CR-00258 EJD
)	
Plaintiff,)	STIPULATION AND [PROPOSED] THIRD
)	SUPPLEMENTAL PROTECTIVE ORDER
v.)	REGARDING FDA AND CMS DOCUMENTS
)	
ELIZABETH HOLMES and RAMESH)	
"SUNNY" BALWANI,)	
)	
Defendants.)	

The United States of America, by and through ADAM A. REEVES, Attorney for the United States Acting Under Authority Conferred by 28 U.S.C. § 515, and JEFF SCHENK, JOHN C. BOSTIC, and ROBERT S. LEACH, Assistant United States Attorneys for the Northern District of California, and the defendants, ELIZABETH HOLMES and RAMESH "SUNNY" BALWANI, and their attorneys, KEVIN DOWNEY and LANCE WADE of Williams & Connolly for HOLMES, and JEFFREY B. COOPERSMITH and STEPHEN A. CAZARES of Davis Wright Tremaine for BALWANI, hereby stipulate and jointly request that the Court issue a third supplemental Protective Order in this case as described below.

1 The parties stipulated to, and the Court entered, a Protective Order in this case on or about July
2 2, 2018 (Docket #28) (“the Original Protective Order”). A Stipulation and Supplemental Protective
3 Order was entered by the Court on July 17, 2019 (Docket #90) (“the Supplemental Protective Order”).

4 During the course of its investigation, the United States has obtained materials from various
5 government agencies, including the Food and Drug Administration (“FDA”) and the Centers for
6 Medicare & Medicaid Services (“CMS”), and may obtain additional materials from the foregoing
7 agencies or from other similar government agencies (collectively “the Agencies”). These materials may
8 contain information that the Agencies consider confidential commercial information, trade secrets,
9 Protected Health Information (PHI, as defined in HIPAA), or protected by certain privileges and
10 doctrines, such as work product, attorney-client privilege, and deliberative process. The materials may
11 also contain information unrelated to the defendants or Theranos, Inc. (“Theranos”). The Original
12 Protective Order and the Supplemental Protective Order previously provided procedures to facilitate the
13 production of Private Documents and Government Agency Documents, as those terms are defined in
14 those orders.

15 After those Protective Orders were entered by the Court, the Court issued an Order on July 19,
16 2019, instructing the Agencies to search for and produce all documents responsive to the six categories
17 of documents requested by the parties by October 2, 2019. Given this deadline, the Agencies will have
18 limited time to review the potentially responsive documents before production. As a result, non-
19 responsive, privileged, or otherwise protected information, including deliberative internal
20 communications that are not about Theranos, may be produced to the parties. The Agencies have
21 therefore advised that a further order is needed expressly stating that such productions will not be
22 considered a waiver of any privileges or other applicable protections. Deliberative process privileged
23 information that relates specifically to Theranos is not encompassed within this requested order because
24 the Agencies have waived deliberative process privilege for information relating to Theranos.

25 Accordingly, in order to further facilitate the production of documents by the Agencies, the
26 parties stipulate and agree as follows:

- 27 1. The production to the United States, Holmes, and/or Balwani of non-responsive,
28

1 privileged, or otherwise protected information in Government Agency Documents, as
2 defined by the Supplemental Protective Order, including but not limited to deliberative
3 internal communications that are not about Theranos contained in such documents,
4 whether knowing or inadvertent, will not be considered a waiver of any privileges or
5 protections that the Agencies may have with regard to such documents or information.

6 2. Deliberative process privileged information that relates specifically to Theranos is not
7 encompassed within this Order because the Agencies have waived deliberative process
8 privilege for information relating to Theranos.

9 3. This Order does not impose any obligation on the defense to identify to the Agencies or
10 the prosecution any material within the production to the United States, Holmes, and/or
11 Balwani of Government Agency Documents that is potentially non-responsive,
12 privileged, or otherwise protected information, including but not limited to deliberative
13 internal communications that are not about Theranos contained in such documents.

14 4. To the extent the Agencies seek to clawback any produced documents as containing non-
15 responsive, privileged, or otherwise protected information, the Agencies shall provide the
16 defense with notice of such clawback by providing the Bates numbers of such documents.

17 5. The defense does not waive, and instead explicitly preserves, any and all arguments that
18 material within the production to the United States, Holmes, and/or Balwani of
19 Government Agency Documents is responsive, not privileged, or otherwise not protected
20 from discovery.

21 //

- 1 6. The parties stipulate to this Order without prejudice to their ability to seek to modify the
2 terms of the Order at a future date.

3
4 DATED: September 17, 2019

Respectfully submitted,

5 ADAM A. REEVES
6 Attorney for the United States
7 Acting Under Authority Conferred
8 by 28 U.S.C. § 515

9 /s/
10 JEFF SCHENK
11 JOHN C. BOSTIC
12 ROBERT S. LEACH
13 Assistant United States Attorneys

14
15 DATED: September 17, 2019

16 /s/
17 KEVIN DOWNEY
18 LANCE WADE
19 Attorneys for Elizabeth Holmes

20
21 DATED: September 17, 2019

22 /s/
23 JEFFREY B. COOPERSMITH
24 STEPHEN A. CAZARES
25 Attorneys for Ramesh “Sunny”
26 Balwani

27
28 SO ORDERED.

DATED: _____

HONORABLE EDWARD J. DAVILA
United States District Court Judge